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ABSTRACT

The American Newspaper Association's 1986 compilation of 45 newspaper antitrust actions filed since 1980 revealed that the majority of antitrust actions during that period involved disputes over advertising practices. The federal government was virtually absent in its enforcement of antitrust laws against newspapers. About one-third of the completed actions actually went to trial (of a sample 13 cases, only two were won by the plaintiffs). Specific allegations included predatory prices (the complaint in about two-thirds of the cases), collusion, price discrimination, tying, refusals to deal, and mergers. An important issue in antitrust cases was the definition of the relevant market, which has both a product and geographic dimension. Before 1980, legal precedent favored a very narrow product and geographic definition of the market within which newspapers operated. Since that year, all five courts of appeal rulings and eight of nine district court rulings have been consistent with this narrow definition. A broader definition would make antitrust enforcement in the newspaper industry even more difficult. Recent actions have been consistent with the predominant view that newspapers provide a service to readers and advertisers, that they are not simply a commodity of paper and ink. An analysis of predation actions, the most common recent charge, suggests that many antitrust actions may be brought to stifle competition rather than to protect it. Further in-depth studies of newspaper antitrust actions are called for. (One table of data and 22 references are included.) (AEW)

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1980-1986

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AN ANALYSIS OF NEWSPAPER ANTITRUST ACTIONS:

1980-1986

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Abstract

In December, 1986, the ANPA released a compilation of 45 newspaper antitrust actions filed since 1980. This paper analyzes the ANPA antitrust data base. Though responsible for enforcing the antitrust laws, the federal government was involved in only one case during this period. About 85% of the actions involved advertising-related complaints. One-third of all the actions actually went to trial.

Predatory pricing was the most common allegation with 29 actions, followed by collusion, price discrimination, tying, refusals to deal, and mergers. By observing the resolutions of these actions, it is clear that success for the plaintiff is rare, unless some of the dismissals hide a favorable compromise. Eight of nine cases define the relevant market for newspapers in narrow product and geographic terms, excluding, for example, television and radio stations as competitors of newspapers. This remains consistent with the previous precedents on this subject.

Using the example of predatory pricing, it is suggested that many of the antitrust actions brought may not actually be seeking protection from anticompetitive actions, so much as to be a source of anticompetitive activity themselves.

AN ANALYSIS OF NEWSPAPER ANTITRUST ACTIONS:

1980-1986

The American Newspaper Publishers Association has recently compiled information on newspaper antitrust cases filed from 1980 through the end of 1986.¹ During this period, 45 newspaper antitrust actions were started. The ANPA document includes the case name, a summary of the complaint, a summary of any court orders, and a chronology of actions taken on each case.

Analysis of this rich data base can provide many useful insights into the nature of the application of antitrust laws to the newspaper industry. The paper will begin with a general description of the cases filed. Then these cases will be analyzed to see how recent decisions have answered a few important legal questions, such as what constitutes the relevant product market for newspapers, or whether newspapers are a commodity or service (which affects the applicability of certain antitrust provisions). At a more practical level, this analysis will show the probability of success in bringing various actions, as well as present reasons why some antitrust actions succeed or fail.

The Nature of Recent Newspaper Antitrust Actions

Antitrust actions can be brought by both the federal government and private persons (e.g., media companies). Antitrust laws are enforced by two federal government administrative organizations. The Antitrust Division of the Department of Justice enforces the Sherman Act and the Clayton Act.² The

Federal Trade Commission (FTC) enforces the FTC Act.³ Section 1 of the Sherman Act forbids conspiracies in restraint of trade, such as collusion between two or more separate firms to fix prices. Section 2 of the Sherman Act prohibits a single company from monopolizing, or attempting to monopolize, a market through some anticompetitive means such as predation (e.g., setting prices below costs with the intent of driving a competitor out of business). The Clayton Act is primarily used to prohibit price discrimination, exclusive dealing, tying arrangements, and mergers, when the effect of any of these actions "may be substantially to lessen competition or tend to create a monopoly." Section 5 of the FTC Act forbids "unfair methods of competition." It has been used infrequently in newspaper antitrust proceedings.

Of the 45 newspaper antitrust actions, only one action was brought by the United States government, through its Antitrust Division of the Department of Justice. No actions were brought by the FTC. The case brought by the Department of Justice challenged a merger under section 7 of the Clayton Act. The Department of Justice gained a victory by succeeding in getting a consent decree which required the defendant to sell the merged properties in question.⁴

Beyond this one successful case, the absence of federal government antitrust enforcement has two practical consequences for owners of newspapers and shoppers who believe they are the victim of some anticompetitive activity. Either it means that there was only one newspaper antitrust action that had any merit,

or it means that the government cannot be relied upon to intervene against anticompetitive practices, and self-proclaimed victims must sue for damages at their own initiative and expense. Given the general lack of success of private antitrust actions, there is at least some truth to the apparent lack of merit in many of these private cases.

Along with the virtual absence of federal government enforcement in the newspaper antitrust area, another lop-sided aspect of these antitrust cases is the dominance of advertising as the bone of contention. Of the 45 actions in the data base, 38, or 84.4%, dealt with advertising issues. To study newspaper antitrust is to study advertising, not in terms of its effects on the buying public, but rather in terms of its effects on newspaper and media industries. Of the seven non-advertising cases, two dealt with territorial exclusivity for news and feature services, two dealt with the pricing of home delivery service, two dealt with independent newspaper distributors, and one involved employees who lost their jobs as a result of alleged monopolization.

The evidence from these 45 newspaper antitrust actions also support the belief that most complaints are never brought to trial. Seven actions are still in progress and have not yet had the opportunity to go to trial. Of the 38 completed actions, only 13, about one-third, went to trial. Of those 13, only two were won by the plaintiffs, one a predatory pricing case and the other a collusion case.

From the summaries of the complaints for the 45 actions, it was possible to compute the frequency of specific violations that

were alleged. These results can be seen in Table 1. The most common charge is predatory pricing, involved in nearly two-thirds of all actions, and twice as common as the next-ranked cause of action. The total number of allegations exceeds 45 because several actions involved multiple charges. Table 1 also summarizes the outcome of the actions brought under the various allegations. No matter what charges are presented in newspaper antitrust actions, Table 1 shows that the success rate from the point of view of the plaintiff is poor, unless a significant number of dismissals mask compromises or concessions of benefit to plaintiffs.

Predatory pricing is a violation of Section 2 of the Sherman Act. It usually involves pricing advertising below the short-run marginal cost, or average variable cost, of producing the advertising, with the intention of reducing competition. Subscription or copy prices may also be priced in a predatory manner. A later section of this paper provides some detail regarding these plentiful predation charges.

One third of the actions in the ANPA data base involved a claim of collusion, which is prohibited by under Section 1 of the Sherman Act. As the name suggests, collusion requires some conspiracy between two or more firms which has the effect of restraining competition. A surprising cause of the plaintiffs' failure in some collusion actions was a lack of two different defendant firms, which is a necessary pre-condition for collusion to even be possible.⁵

Charges of price discrimination may arise when different

advertisers are offered different prices for the same product, such as through volume discounts or rebates to certain advertisers. Charges of price discrimination in the newspaper industry are typically brought under Section 2 of the Clayton Act or Section 2 of the Sherman Act. A later section will deal with the controversy of whether newspapers are services and, thus, are not bound by the price discrimination prohibition of the Clayton Act.

Tying arrangements typically involve the requirement to purchase some undesirable product in order to qualify for the purchase of some desired product. In this way, a firm with market power in one market can use that power to reduce competition in another market. Market power consists of the ability of a seller to reduce output, raise prices, and earn profits above the level that would exist in a competitive market. For example, in Cutler v. Lewiston Daily Sun, the plaintiff claimed that the defendant refused to provide home delivery of the daily newspaper unless subscribers also subscribed to the Sunday edition.⁶ Tying arrangements may violate Section 3 of the Clayton Act and Section 2 of the Sherman Act. As with price discrimination, should newspapers be deemed not to be commodities, then the Clayton Act prohibition on tying arrangements would not apply.

A "refusal to deal" charge may be brought when a newspaper refuses to do business with, for example, a competitor, a distributor, or an advertiser. Typically, this charge arises when a newspaper changes to direct distribution from independent distribution, or when it refuses advertisements. Charges may be brought under Section 1 or 2 of the Sherman Act. Mergers which

"substantially lessen competition, or tend to create a monopoly" are prohibited by section 7 of the Clayton Act.

The Newspaper Preservation Act provides an antitrust exemption to permit collusion among qualified newspapers within a local market. The three actions brought here involved a challenge to the qualifications of newspapers under the Act, or challenged protected newspapers' ability to engage in activities thought not to be covered by the Act.

The Relevant Market for Newspapers

Antitrust law is concerned with regulating economic performance within markets. A market is an interrelated group of buyers and sellers. The buyers and sellers are interrelated by virtue of exchanging the same, or similar, product in a common geographical area.⁷ Defining these product and geographic dimensions to markets are important because they determine the size of the relevant market. This, in turn, helps to determine answers to antitrust questions, such as whether a merger will lessen competition "in any line of commerce...in any section of the country," or whether a predatory practice will lead to the monopolization of some market. Therefore, the outcome of some antitrust actions are very dependent on the issue of what constitutes the relevant market within which newspapers operate.

Two U.S. Supreme Court cases comprise the standing legal precedent in defining the relevant market for daily newspapers. In Citizen Publishing and Times Mirror, the product market was defined as daily newspapers only, and the geographic market was

small and local.⁸ This narrow product market definition is often challenged by newspaper publishers who wish to include all local advertising media in the product market. This broader interpretation would give newspapers a smaller market share. With a smaller market share, newspapers would be considered less likely to monopolize a market or do something that would substantially lessen competition, and so they would be more insulated from antitrust intervention.

The data base of newspaper antitrust cases filed from 1980 to 1986 generally remains consistent with the narrow market definition presented in the two Supreme Court precedents. Of the 45 cases listed, nine cases specifically define the relevant market involved. Not all cases involve daily newspapers, so the market definitions often involve extending the narrow boundaries principle of Citizen Publishing and Times Mirror to cases involving weeklies or shoppers.

Of the nine district court cases which define the market, five were affirmed by courts of appeal. All these courts of appeal's cases used a narrow product and geographic definition. For example, the First Circuit Court of Appeal held that the Providence Journal had a monopoly in the daily newspaper rental advertising market in the Providence city zone. Other media, including radio, television, billboards, and weekly newspapers, were specifically considered not to be reasonably interchangeable with the rental columns of daily newspapers.⁹

While all five courts of appeal cases used a narrow definition, eight of nine district court decisions used the narrow definition. In the one exception, the district court

judge rejected the plaintiff's contention that the product market was limited to newspaper display advertising. That judge stated, "From the evidence presented the more probable relevant product market is an ill-defined submarket consisting of local newspaper display advertising, local radio, billboards, zoned direct mail, etc." It should not be surprising that such a product market would be "ill-defined," since it contradicts the two Supreme Court decisions, and all five recent courts of appeal decisions on this question. The case was not appealed.¹⁰

While it is not surprising that complete unanimity is absent, the standing precedent of the two Supreme Court cases defining the relevant market for newspapers in a narrow sense are followed in current district court and courts of appeal cases. A newspaper would be ill-advised to base its case on the argument that newspapers exist in a product market consisting of all local print and non-print media. It would also be dangerous to argue that all print media (dailies, weeklies, and shoppers) exist in the same market, although the case law here is less consistent.¹¹

The Commodity Status of Newspapers

Among antitrust case law for all products, charges of price discrimination and illegal tying arrangements are usually brought under Sections 2 and 3, respectively, of the Clayton Act. Both these sections apply only to commodities, e.g., "that it shall be unlawful...to discriminate in price between different purchasers of commodities of like grade and quality..."¹² On the one hand, newspapers may be commodities because they are tangible items of

paper and ink. On the other hand, their essence can be said to be an intangible service: information for readers and the attention of those readers for advertisers. If newspapers are considered commodities, they would be subject to the price discrimination and tying prohibitions of the Clayton Act. If newspapers are considered, instead, to provide a service, they would avoid Sections 2 and 3 of the Clayton Act.

In the newspaper antitrust case law prior to 1980, there was some disagreement as to the commodity status of newspapers, although the stronger precedent seemed to favor newspapers as a service. The Supreme Court has not ruled on the matter. In National Tire, a district court ruled "that newspaper advertising is not a 'commodity' within the meaning of" Sections 2 and 3 of the Clayton Act.¹³ This decision was affirmed by a court of appeal. A different court of appeal came to the same conclusion in Ambrook Enterprises.¹⁴ The final case prior to 1980 that ruled on the commodity issue is Sun Communications.¹⁵ Here the court ruled that newspapers are a commodity.¹⁶ This case was not appealed. This decision should probably be given less precedent value since it was a district court ruling as opposed to the two courts of appeal decisions in National Tire and Ambrook Enterprises.

Turning to the newspaper antitrust actions since 1980, the ANPA data base does not shed much additional light on the subject. There were a net total of 17 actions which alleged either price discrimination or an illegal tying arrangement. Of these, only one mention of the newspaper commodity issue is made. In denying a preliminary injunction, a district court ruled that

advertising in a shopper and daily newspaper is probably not a commodity.¹⁷ These recent antitrust actions may be instructive for what they don't say. Nine of these 17 actions did not use Sections 2 or 3 of the Clayton Act in bringing suit, presumably because it is generally understood that these sections are inapplicable due to the non-commodity status of newspapers. None of the actions that did claim violations of Section 2 or 3 of the Clayton Act were successful.

Claims of price discrimination and illegal tying arrangements can be brought under other antitrust provisions that do not exclude services, i.e., Sections 1 and 2 of the Sherman Act and Section 5 of the FTC Act. Using these statutes, particularly the Sherman Act, places a tougher burden on the plaintiff than the Clayton Act provisions. Section 1 of the Sherman Act requires a finding of a conspiracy between two or more separately owned firms. Typically, alleged price discrimination and illegal tying arrangements involve a single firm. Section 2 of the Sherman Act requires proving that the defendant's action occurs with an intent to acquire or maintain a monopoly that has a reasonable chance of success. Price discrimination is typically not used to acquire or maintain a monopoly, but rather to exploit market power that already exists.¹⁸

As a result of the fairly definitive interpretation of newspapers as a service rather than a commodity, and the difficult task of establishing a price discrimination or tying violation under Section 1 or 2 of the Sherman Act, actions in

these two areas hold little chance for success. From 1980 to 1986, plaintiffs won no cases alleging either price discrimination or an illegal tying arrangement.¹⁹

Predation: The Most Common Antitrust Allegation

As noted previously from Table 1, the charge of predation (usually involving pricing) is the most common antitrust charge, and is found in nearly two-thirds of all newspaper antitrust actions brought between 1980 and 1986. To win a predatory pricing case, the plaintiff must establish four conditions. First, that the defendant set prices (usually advertising prices) below some measure of costs (usually short-run marginal or average variable). Second, the plaintiff must show that the defendant's intent in setting prices below cost was either to drive the plaintiff out of business or to discipline the plaintiff into setting less competitive prices. Third, there must be a dangerous probability that the defendant will succeed in its predation. Finally, the plaintiff must show that it has been damaged (i.e., lost profit) as a result of the defendant's predatory prices.

Table 1 shows that in the recent time period under study, the probability of the plaintiff establishing these four points is very low. Of the 29 actions involving an allegation of predatory pricing, 18 have come to a known resolution or have been dismissed. Of these 18, only one plaintiff was able to establish these four points to the satisfaction of a court.²⁰ Actually, only the first three points were established in this case since the successful plaintiff was awarded only one dollar

(plus attorney's fees) in damages.

This raises some questions about the efficacy of the most common newspaper antitrust charge. Perhaps the most likely explanation for the failure of plaintiffs is that predation really does not occur in most cases where it is alleged. Most economists believe that predation is often a foolish strategy, rarely employed in practice, and is likely not to succeed in any case.²¹

Rather than viewing the alleged predator as culprit, we might wish to cast a suspicious eye toward the plaintiff as being the real victimizer of competition. This possibility becomes apparent when considering a typical predation allegation. A weekly newspaper has a monopoly on newspaper advertising in its community. As expected, it charges high, monopoly-level advertising prices, and enjoys high, monopoly-level profits. A different firm enters the market with, say, a free distribution shopper and spoils the weekly's monopoly. The shopper charges lower advertising prices, nearer the competitive level, and the weekly cries foul. The weekly alleges that the shopper has set predatory prices with the intention of driving the weekly out of business and destroying competition. In fact, the shopper has actually created competition where none existed before. As a result, both advertisers and consumers who buy the advertised products are better served by the competition. Only the weekly has suffered because it no longer can enjoy monopoly profits. In such a case, the cause of improving economic performance through the encouragement of competition would be ill-served by a victory

for the plaintiff.

Indeed, some economists would argue that this is the typical scenario for virtually all predation cases. Plaintiffs in predation cases are viewed by these economists as the enemy of competition. They argue that consumer welfare would be served best by an elimination of predation as a possible antitrust violation since the enforcement of laws against predation is more likely to punish the "innocent" and harm competition than to punish real predators and promote competition.²² Certainly any predation case in the newspaper area would have to demonstrate that the goal of improved competition would be served by a finding against the defendant, and this is no small task.

Allegations of predatory pricing may themselves be predatory since they cause the alleged predator to make a tough decision: either continue with the current competitive pricing strategy and pay legal fees to defend that practice, or raise prices and avoid the litigation. It should not be surprising if defendants often take the second option and get the action dismissed. This may explain the high proportion of dismissed cases in the predation area, as well as the dismissed cases in other areas as well. It would be a useful study to determine the extent to which private (and government-caused) antitrust actions actually serve to harm economic performance by causing a chilling effect on actions which actually improve consumer welfare.

Summary

This paper has analyzed several aspects of the census of newspaper antitrust actions filed between 1980 and December,

1986. The federal government was shown to be virtually absent in its enforcement of antitrust laws against newspapers, unless one interprets this absence as reflecting the general lack of merit in most private newspaper antitrust actions. With only a few exceptions, most antitrust actions involved disputes over advertising practices.

About one-third of the completed actions actually went to trial. Of these 13 cases, only two were won by the plaintiffs. Predatory pricing was the most common allegation, involved in about two-thirds of all actions. Other specific allegations involved collusion, price discrimination, tying, refusals to deal, and mergers. Table 1 shows that the plaintiff met with poor success in all these areas, with the best chance for success in merger cases.

An important issue in antitrust cases is the definition of the relevant market, which has both a product and geographic dimension. Legal precedent prior to 1980 favored a very narrow product and geographic definition of the market within which newspapers operate. Since 1980, all five courts of appeal rulings and eight of nine district court rulings are consistent with this narrow definition. A broader definition would make antitrust enforcement in the newspaper industry even more difficult than it is now.

Recent actions also are consistent with the predominant view that newspaper provide a service to readers and advertisers, rather than being a commodity of paper and ink. An analysis of predation actions, the most common recent charge, suggest that

many antitrust actions may be brought not to protect competition, but rather to stifle it. An interesting in-depth study of a sample of newspaper antitrust actions could lend much light to this issue.

ENDNOTES

¹Lisa M. Dawson, "Compilation of Newspaper Antitrust Cases," Revised December, 1986, for the American Newspaper Publishers Association.

²Sherman Antitrust Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. sections 1-7. See, particularly, sections 1 and 2 of this act. Clayton Act, 38 Stat. 730 (1914), as amended, 15 U.S.C. sections 12-27. See, particularly, sections 2, 3, 4, and 7.

³Federal Trade Commission Act, 38 Stat. 717 (1914), as amended. See section 5(a)(1) of the act.

⁴United States v. Tribune Co. and Sentinel Star Co., No. 82-260-ORL-Civ-R, (M.D.Fla. 1984).

⁵For example, see Tiftarea Shopper v. Georgia Shopper, (11th Cir. 1986), 12 Med. L. Rptr. 1995. Here the court ruled that the defendants were all agents for the same corporation. No conspiracy could exist because a corporation cannot conspire with itself.

⁶Cutler v. Lewiston Daily Sun, No. 84-0042-P, (D.Me. 1985). The case was later dismissed.

⁷In United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 404 (1956), the Supreme Court defined a relevant market to be "composed of products that have a reasonable interchangeability for the purposes for which they are produced--price, use and qualities considered."

⁸United States v. Citizen Publishing Co., 280 F. Supp. 978 (D.Ariz. 1968) aff'd, 394 U.S. 131 (1969); United States v. Times Mirror Co., 274 F. Supp. 606 (C.D.Cal. 1967), aff'd per curiam,

390 U.S. 712 (1968).

⁹Home Placement Service, Inc. v. The Providence Journal Co.,
8 Med. L. Rptr. 1881 (1982).

¹⁰Sales and Advertising Promotion v. Donrey, Inc.,
(N.D.Okla. 1984), 11 Med. L. Rptr. 1201.

¹¹Some of the recent cases explicitly exclude weeklies and shoppers from the daily newspaper product market, while others include all print media in the same product market. Typically, when only dailies are involved, the product market will be defined as just including dailies. When a case involves a mix of dailies, weeklies, and shoppers, they may all be included in the same product market. For example, in Action Publications v. Panax Corp., No. M80-177 CA2, (W.D.Mich. 1986), involving a weekly shopper and a Sunday paid newspaper, the District Court defined the relevant market to be "the market for news, advertising, and editorial comment in paid circulation and free distribution newspapers and shopping guides available in Marquette County."

¹²Passage is from section 2(a) of the Clayton Act, 15 U.S.C. section 13(a).

¹³National Tire Wholesale, Inc. v. Washington Post Co., 441 F. Supp. 81, 86 (D.D.C. 1977), aff'd per curiam, 595 F.2d 888 (D.C.Cir. 1979).

¹⁴Ambrook Enterprises v. Time, Inc., 612 F.2d 604 (2d Cir. 1979).

¹⁵Sun Communications, Inc. v. Waters Publications, Inc., 466 F. Supp. 387 (W.D.Mo. 1979).

16 Id., at 390-391.

17 Yuba City Herald Publishing Co. v. Freedom Newspapers, Inc., Civ-84-013MLS EJG, (E.D.Cal. 1984).

18 F.M. Scherer, Industrial Market Structure and Economic Performance, (Chicago: Rand McNally, 1970), pp. 253-259.

19 One case was settled secretly so its outcome is technically unknown. The News-Gazette Corp. v. Welch Daily News, No. 82-0544-R, (W.D.Va. 1986).

20 Advantage Publications v. Daily Press, No. 84-1022(L), No. 84-5015, No. 83-72-NN, (E.D.Va. 1984), (4th Cir. 1985).

21 Scherer, op. cit., pp. 273-278. See also John S. McGee, "Predatory Pricing Revisited," The Journal of Law and Economics, 23:289-326 (1980).

22 McGee, Id., p. 317. Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself, (New York: Basic Books, 1978), p. 154. Frank Easterbrook, "Predatory Strategies and Counterstrategies," University of Chicago Law Review, 48:263 (1981), pp. 318-338.

Table 1:
ALLEGATIONS AND RESOLUTIONS OF 45
NEWSPAPER ANTITRUST ACTIONS, 1980-1986

<u>Allegation</u>	<u>#</u>	<u>%*</u>	<u>P</u>	<u>D</u>	<u>d</u>	<u>E</u>	<u>?</u>
Predatory Pricing	29	64.4%	1	6	11	9	2
Collusion	15	33.3%	2	6	3	4	0
Price Discrimination	14	31.1%	0	3	6	3	2
Tying	12	26.7%	0	2	8	1	1
Refusals to Deal	10	22.2%	2	3	2	2	1
Merger	4	8.9%	1	1	0	1	1
Newspaper Preservation Act	3	6.7%	0	2	1	0	0

Explanation of symbols:

- # Number of actions making the specified allegation.
- % Proportion of the 45 actions making the specified allegation.
- * Exceeds 100% due to multiple allegations.
- P Number of actions decided in plaintiff's favor.
- D Number of actions decided in defendant's favor.
- d Number of actions dismissed.
- E Too early to know outcome of action.
- ? Action is resolved, but terms not known.